SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5078

DEAN RENE PETERS,

Petitioner,

v.

C. P. KIFF, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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OPINION BELOW

The opinion below is reported at 441 F.2d 371.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1). The judgment of the Fifth Circuit Court of Appeals issued on March 11, 1971 (A. 20). The

petition for rehearing and for rehearing en banc was denied on April 13, 1971. (A. 22) The petition for certiorari was filed in this Court on July 12, 1971. This Court granted certiorari on November 22, 1971. (A. 24)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions:

1. United States Constitution (Amendment VI):

"In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

2. United States Constitution (Amendment XIV, Sec. 1):

". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. Statutory Provisions:

1. Civil Rights Act of March 1, 1875, Sec. 4, 18 Stat. 336-337, now 18 U.S.C. 243:

"AN ACT TO PROTECT ALL CITIZENS IN THEIR CIVIL AND LEGAL RIGHTS

"Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore . . .

* * * * *

"Sec. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any

State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars."

2. Georgia Code Annotated, Title 59, Sec. 106:

"Revision of jury lists. Selection of grand and traverse jurors.—Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall revise the jury lists.

"The jury commissioners shall select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these the most experienced, intelligent, and upright citizens to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

3. Georgia Code Annotated, Title 92, Sec. 6307:

"Entry on digest of names of colored persons.—The tax receivers shall place the names of the colored taxpayers, in each militia district of the county, upon the tax digest in alphabetical order. Names of colored and white taxpayers shall be made out separately on the tax digest.

"(NOTE: Georgia Laws 1966, page 393, effective March 10, 1966, repealed the above and foregoing section. However no revision of the jury lists was made subsequent to the effective date of the repealer

and prior to the second trial of appellant, and no revision of the jury list could have been made subsequent to the effective date of the repealer and prior to August of 1966, under the provisions of Section 59-106, Georgia Code Annotated)."

QUESTIONS PRESENTED FOR REVIEW

1. Does a white person have standing to challenge (a) an indictment returned by a grand jury from which negroes were systematically excluded, and (b) a sentence entered on a verdict returned by a petit jury from which negroes were systematically excluded?

2. Assuming that a white person has a right to challenge the grand and petit juries from which negroes were systematically excluded (a) is this a new rule of law as to which there is a question of retroactivity, and (b) if this right of a white person is a new rule of law, does logic and public policy require retrospective application of this rule?

STATEMENT OF THE CASE

The petitioner was indicted for the offense of burglary by the Grand Jury of Muscogee County, Georgia, on June 6, 1966, in Indictment No. 24-927. (A. 9) Shortly thereafter petitioner was tried and convicted. Petitioner appealed his original conviction on the charge of burglary to the Court of Appeals of Georgia, and his original burglary conviction was reversed and remanded for re-trial. *Peters v. State,* 114 Ga. App. 595. Upon re-trial on the same indictment, petitioner was re-convicted on December 8, 1966, with a sentence of ten years. (A. 10) This conviction was appealed to the Court of Appeals of Georgia, and the conviction was affirmed. *Peters v. State,* 115 Ga. App. 743. A motion for re-hearing was denied by the Court of Appeals of Georgia. On June 12, 1967, petitioner filed his first Federal habeas corpus petition in the United States District Court for the Middle District of Georgia, Columbus Division.

In his petition, he asserted, among other grounds:

1. Systematic exclusion of negroes from the grand and traverse (petit) juries by which he was indicted and tried.

2. Exclusion of all non-property owners from the grand and traverse juries.

The District Court dismissed without granting an evidentiary hearing. *Peters v. Rutledge,* 397 F.2d 731 (1968).

Appeal was then taken to the United States Court of Appeals for the Fifth Circuit. On June 6, 1968, the Fifth Circuit affirmed partly on the merits as to the search and seizure claim and partly for failure of petitioner to exhaust his State remedies. *Peters v. Rutledge, supra,* p. 741, in light of Georgia's habeas corpus act of 1967, Ga. Laws 1967, p. 835, Ga. Code Ann. Sec. 50-127. On November 22, 1967, the Supreme Court of Georgia in *Strauss v. Grimes,* 223 Ga. 834 (1967), held that judicial review of jury discrimination is foreclosed when the accused offered no objection to the composition of the jury venire during the trial and the conviction occurred prior to the decision in *Whitus v. Georgia,* 385 U.S. 545 (1967). This rule of the Supreme Court of Georgia made resort to the Georgia courts unnecessary. Petitioner therefore had no available State remedy to exhaust and on March 16, 1970, filed his second petition for Federal habeas corpus in the United States District Court for the Middle District of Georgia asserting as the sole grounds for relief:

> 1. Systematic exclusion of negroes from the grand and traverse (petit) juries by which he was indicted and tried.
>
> 2. Exclusion of all non-property owners from the grand and traverse juries.

The District Court on April 22, 1970, again dismissed the petition without an evidentiary hearing (A. 15). The reasons given for dismissal as stated in the order were:

(1) That the merits of substantially the same issues here raised were determined adversely to Petitioner by virtue of the order and judgment of this Court entered in Civil Action No. 1233, in the Columbus Division, on July 5, 1967, and affirmed by the United States Court of Appeals for the Fifth Circuit on June 6, 1968. *Peters v. Rutledge*, 397 F.2d 731.

(2) That the Petitioner has failed to exhaust his available state remedies.

(3) That the petition fails to set forth a cause of action upon which relief can be granted.

Appeal was then taken to the Fifth Circuit Court of Appeals. On March 11; 1971, the Fifth Circuit affirmed the dismissal. *Peters v. Kiff*, 441 F.2d 731 (1971). In its ruling, the Fifth Circuit held that return to State Court by petitioner was not required because he had no available State remedies. *Peters v. Kiff, supra.* The petition for rehearing in the Fifth Circuit was denied on April 13, 1971.

This ruling of the Fifth Circuit dealt directly with reason No. 2 of the District Court's order on the question of exhaustion of State remedies. Reason No. 1 for dismissal in the District Court's order stated that:

> ". . . merits of substantially the same issues were determined adversely to petitioner." (A. 15)

Both habeas corpus petitions having been dismissed without an evidentiary hearing, no determination on the "merits" has ever occurred. *Peters v. Rutledge, supra; Peters v. Kiff, supra.*

This dismissal by the District Court and affirmance by the Circuit Court constituted a determination that the petitioner, a white man, could not state a cause of action upon which relief could be granted by proof of systematic exclusion of negroes from the grand and traverse juries. This was reason No. 3 in the District Court's order of dismissal. (A. 15)

On December 6, 1966, the Fifth Circuit in *Vanleeward v. Rutledge,* 369 F.2d 584 at 587 (5th Cir. 1966) held that the traverse jury list in Muscogee County "as made up, was so heavily weighted against the possibility of inclusion of negroes of the member race in any traverse panel as to cause it to fall within the condemnation of the decided cases." In *Vanleeward,* the traverse jury list was made up by selection from the Tax Digest. Fourteen percent of those listed on the Tax Digest were negro and eighty-six percent were white. The names of white taxpayers were kept on white sheets and the names of negro taxpayers were kept on yellow sheets. Although the grand and traverse juries which indicted and convicted petitioner were not selected from the same jury box that Vanleeward's grand jury was selected from, the jury box was being filled in the same discriminatory manner in accordance with the provisions of Ga. Code Ann. Sec. 92-6307 which required that tax digests be segregated according to race. This law was deleted from Georgia law on January 1, 1967. The law requiring traverse juries to be chosen from registered voter lists instead of the tax digest did not become effective until March 30, 1967. *Peters v. Rutledge, supra,* at 739. At p. 740 of that opinion, the Fifth Circuit stated:

> "One of the matters which the Georgia Courts may well necessarily have to consider initially is the extent to which our holding in *Vanleeward v. Rutledge, supra,* will operate either as a sort of *in rem* finding of fact on demonstrable historical facts which cannot likely vary, or at least as stare decisis with respect to the method of jury selection in Muscogee County and whether without further evidential proof that this method resulted in unconstitutionally constructed juries. Since Appellant's trial began one day after the decision in *Vanleeward,* but several months before effective changes were made in the method of jury selection, the Georgia courts may well determine that it is not necessary to prove again all the same facts and statistics that led this Court to reach the result that it did in *Vanleeward.*

> In these days of exploding dockets, every consideration points toward an avoidance of this waste of judicial energy."

The holding in *Vanleeward* should have been held to establish an *in rem* finding of fact; however, petitioner under the laws of Georgia was unable to raise for consideration such an issue in the State courts because of Georgia's rule that a white person may not complain of the systematic exclusion of negroes from the juries by which he was indicted and tried.[1]

SUMMARY OF ARGUMENT

The Sixth Amendment to the Constitution of the United States provides for the right to trial by jury. This right means a jury constituting a body truly representative of a cross-section of the community. In addition, Congress declared in Section 4 of the Civil Rights Act of 1875 that exclusion of citizens from service upon the jury because of race was illegal. The due process and equal protection of law provisions of the Fourteenth Amendment to the Constitution of the United States require that all State juries be a body truly representative of the community. A jury is not truly representative of the community and is illegally constituted if there has occurred a systematic exclusion of an identifiable class on the basis of race. If a racial exclusion of identifiable class has occurred, a criminal defendant is denied due process and equal protection of the law. The right of a defendant to complain of such a denial is not dependent upon a showing of factual prejudice but exists as a fact because he has not been tried in accordance with the law. An accused, irrespective of his race, cannot be indicted before a grand jury or tried before a traverse petit

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[1] *Cash v. Smith*, 226 Ga. 318 (1970); *Neal v. Smith*, 226 Ga. 96 (1970); *Massey v. Smith*, 224 Ga. 721 (1968); *Mitchell v. State*, 225 Ga. 656 (1967); *Clark v. State*, 224 Ga. 966 (1968).

jury which was illegally impaneled by the systematic exclusion of an identifiable class on the basis of race.

Petitioner, a white man, therefore can complain of the exclusion of negroes from the grand and traverse juries by which he was indicted and tried.

ARGUMENT

POINT I

A WHITE PERSON HAS STANDING TO CHALLENGE AN INDICTMENT RETURNED BY A GRAND JURY FROM WHICH NEGROES WERE SYSTEMATICALLY EXCLUDED, AND SENTENCE ENTERED ON A VERDICT RETURNED BY A PETIT JURY FROM WHICH NEGROES WERE SYSTEMATICALLY EXCLUDED.

The practice of excluding Negroes from state grand and petit juries has, since 1879, been consistently condemned by the Supreme Court as a violation of the Fourteenth Amendment.[2] As articulated in *Gibson v. Mississippi*, 162 U.S. 565, 580 (1896), a state may not, consistent with the provisions of the Fourteenth Amendment, deny to Negroes, because of their color, "the right or privilege accorded to

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[2] *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Virginia v. Rives*, 100 U.S. 313 (1879); *Ex parte Virginia*, 100 U.S. 339 (1879); *Neal v. Delaware*, 103 U.S. 370 (1880); *Carter v. Texas*, 177 U.S. 442 (1900); *Norris v. Alabama*, 294 U.S. 587 (1935); *Habe v. Kentucky*, 303 U.S. 613 (1938) (per curiam); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Smith v. Texas*, 311 U.S. 128 (1940); *Hill v. Texas*, 316 U.S. 400 (1942); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Cassell v. Texas*, 339 U.S. 282 (1950); *Avery v. Georgia*, 345 U.S. 559 (1953); *Williams v. Georgia*, 349 U.S. 375 (1955); *Reece v. Georgia*, 350 U.S. 85 (1955); *Michel v. Louisiana*, 350 U.S. 91 (1955); *Eubanks v. Louisiana*, 356 U.S. 584 (1957); *Swain v. Alabama*, 380 U.S. 202 (1965); *Whitus v. Georgia*, 385 U.S. 545 (1967); *Cobb v. Georgia*, 389 U.S. 12 (1967) (per curiam); *James v. Georgia*, 389 U.S. 1 (1967) (per curiam); *Sims v. Georgia*, 389 U.S. 404 (1967) (per curiam); *Anderson v. Georgia*, 390 U.S. 206 (1968) (per curiam); *Sullivan v. Georgia*, 390 U.S. 206 (1968) (per curiam).

white citizens of participating as jurors in the administration of justice."

Even before the Supreme Court had spoken on the matter, the Congress had declared, in Section 4 of the Civil Rights Act of March 1, 1875, 18 Stat. 336-337, now 18 U.S.C. 243, that, "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude . . ." That statute, enacted pursuant to the authority found in Section 5 of the Fourteenth Amendment for the Congress to enforce the constitutional proscriptions by appropriate legislation, was upheld as fully consistent with the provisions of the Amendment in *Ex parte Virginia, supra.*

Thus, it is clear beyond conjecture, that when the Muscogee County jury commissioners systematically excluded Negroes from the grand and traverse (petit) jury, they were acting in direct contravention of federal constitutional and statutory commands. And, as purposeful racial exclusions lead to "presumptive constitutional violations," a tribunal set up in defiance of those commands "is an unlawful one whether . . . [a court] think[s] it unfair or not." *Faye v. New York,* 332 U.S. 261, 292-293 (1947).

Furthermore, both the Supreme Court and this court have recognized that, "it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith v. Texas,* 311 U.S. 128, 130 (1940).[3] Whereas it is

[3] *Glasser v. United States,* 315 U.S. 60, 85 (1942); *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 220 (1946); *Ballard v. United States,* 329 U.S. 187, 191 (1946); *Fay v. New York,* 332 U.S. 261, 299-300 (1947) (Murphy, J., dissenting); *Brown v. Allen,* 344 U.S. 443, 474 (1953); *Witherspoon v. Illinois,* 391 U.S. 510, 524, 530-32 (1968) (Douglas, J., concurring); *Scott v. Walker,* 358 F.2d 13, 19 (C.A. 5, 1966); *Labat v. Bennett,* 365 F.2d 698, 712, 719-20 (C.A. 5, 1966); *Brooks v. Beto,* 366 F.2d 1, 11-14 (C.A. 5, 1966); *Pullum v. Greene,* 396 F.2d 251, 255-57 (C.A. 5, 1968); *Billingsley v. Clayton,* 359 F. 2d 13 (C.A. 5, 1966).

not clear which classes or groups a state may purposefully exclude and still comply with its constitutional obligations to a defendant, see, e.g., *Faye v. New York, supra*; and *Rumper v. North Carolina*, 391 U.S. 543 (1968), it is clear that the purposeful exclusion of Negroes deprives the jury, in the constitutional sense, of its representative character.[4]

The grand jury which indicted petitioner was illegally constituted because of the systematic exclusion of Negroes. The Supreme Court recognized in *Faye v. New York, supra*, that racial exclusions from state juries enjoy the unique status of clear and unambiguous federal constitutional and statutory condemnation. The Supreme Court has recognized that in cases where indictments have been returned by grand juries consituted in violation of these federal provisions prejudice to a defendant is presumed from the fact that the jury was constituted in violation of federal law, *id.*, at 292-293. As the Court explained in *Hill v. Texas, supra*,

> "* * * [N]o State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. * * * [I]t is our duty as well as the State's to see to it that throughout the procedure for bringing him [defendant] to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, * * * [defendant] has laid bare a [racial] discrimination in the selection of grand jurors, the conviction cannot stand because the Constitution prohibits the procedure by which it was obtained. Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, *the benefits of which every person may demand*." 316 U.S. 400, at 406 (emphasis supplied).

We recognize that the Supreme Court has articulated the aforementioned presumption of prejudice rule in cases in

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[4] E.g., *Billingsley v. Clayton*, supra; *Labat v. Bennett*, supra, *Brooks v. Beto*, supra; *Pullum v. Green*, supra.

which the defendant was a member of the excluded class. However, in the context of federal jury selection, in *Ballard v. United States, supra,* the Court did have occasion to consider the question of whether a male had standing to complain about the systematic exclusion of females from the grand and petit juries which indicted and convicted him. Ignoring the lack of identity with the excluded class, the Court held that petitioners (a mother and son) had standing to raise the exclusion issue and, since the exclusion was admitted, ordered the indictments quashed.

At the time of the *Ballard* decision, the applicable federal statute provided that jurors in a federal court should possess the same qualifications as required in the state in which the federal court was located. The *Ballard* district court was located in a state where women were eligible for jury service. Nevertheless, by local state practice, women were excluded from jury service, and the federal court followed local practice and likewise excluded women.

The Court began its analysis by pointing out that neither the federal statute nor the state jury qualification statute exempted women. It concluded that "The system of jury selection which Congress has adopted contemplated, therefore, that juries in the federal courts sitting in such States should be representative of both sexes." *Id.*, at 191. Thus, the exclusion of women did "not accord to the defendant the type of jury to which the law entitled him. It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him." *Id.*, at 187, quoting from *Kotteakos v. United States,* 328 U.S. 750 (1946).

The relevance of *Ballard* to the present case is that it identifies an interest which individuals, not members of the excluded class, have at stake in the composition of the grand jury. A defendant, in order to assert his interest, need not show that the particular exclusion harmed him in some special way; he need not show that the outcome would have been, or is, likely to have been different if the class had not

been excluded, for "reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection." 329 U.S. at 195.

Here, there is also a federal statutory declaration that Negroes may not be excluded from the grand jury, 18 U.S.C. 243; in addition, the excluded class is assuredly less interchangeable with the included than was the case in *Ballard*. Petitioner herein is equally well able to claim therefore, that he was denied the type of jury to which the law entitles him and that the absence of the excluded class deprived the jury of an element of the community for which there could be no substitute.

While in *Ballard* the Court was acting pursuant to its supervisory powers over the federal courts, no reason exists why the Court's rule on standing, based as it was upon federal statutory rights, should not also apply in cases where the challenge is made to the selection of state jurors. Here standing is also based on a federal statute (declarative of constitutional principles) and absent some rule of independent constitutional dimension which isolates the state procedures from attack by a defendant moving under a federal law and possessing all the attributes found sufficient in *Ballard* to give such person standing to challenge an exclusion from the grand jury, this court should take cognizance of the attack here made.

No reason in law or policy exists for constructing different rules of standing to challenge the selection of state or federal juries, especially when racial exclusion is alleged. Clearly the state has no interest at stake which is worthy of stringent protection—the Muscogee County grand jury and traverse (petit) jury was clearly an illegally constituted body. And, furthermore, state officials have been under a clear constitutional and statutory duty not to discriminate against Negroes in the selection of jurors for close to one

hundred years. On the other hand, it is in the interest of society that compliance with federal law be enforced.[5]

Racial exclusions from jury service enjoy a unique status in the criminal law. Whereas, on the other hand, for example, only a defendant who can demonstrate the invasion of his personal constitutional privilege against unlawful search and seizure may invoke the exclusionary rule, see, e.g., *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961 (1969), and *Wong Sun v. United States*, 371 U.S. 471 (1963), when systematic racial discrimination is alleged the Supreme Court has indicated that the courts should presume the requisite injury from the very fact of the exclusion, *Fay v. New York, supra*, at 292-293.

By constitutional and statutory declaration Negroes are required to be included, equally with white persons, in the administration of justice by serving on grand and petit juries. Those explicit commands embody, we believe, a judgment that as the Negro is an integral part of the community in which he lives, his systematic exclusion from the jury rolls

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[5]Holding that a white person cannot complain raises an issue identical to the question presented by other state-imposed racial classifications: Is separate equal? For the logical result of these decisions is two racially separate systems of justice.

A prototype of separate but equal justice is already found in our history. In many communities, both North and South, law enforcement officers have regarded crimes committed by Negroes against Negroes as being different from interracial crimes or crimes involving two whites. There was a tacit, but official, attitude that permitted conflicts between Negroes to seek their own solution. See, *G. Myrdal, An American Dilemma*, 542, 969, 1336 n. 4 (1944). In nullifying the separate-but-equal doctrine with respect to racial segregation of schools, the Supreme Court emphasized the importance of ensuring that all persons are able to participate in the rights and duties of citizenship. See, *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Providing an equal opportunity for all persons to exercise those rights and fulfill those duties within the context of a unitary judicial system is at stake here and is of paramount importance to the community at large.

would be not only inconsistent with his obligations of citizenship but also that a jury drawn from such a list would be an unfair as well as unlawful body. As such, it should make no difference whether the defendant asserting the unfairness of the jury by reason of purposeful racial discrimination is a black or a white person. Petitioner perceives no reason why, in the face of the constitutional and statutory provisions, the courts should engage in an attempt to isolate degrees, if any,[6] of prejudice.

Georgia has long recognized prejudice resulting from failure to lawfully impanel or swear jurors. In *Tomkins v. State*, 138 Ga. 465, 467 (1912), the Supreme Court of Georgia said:

> "Grand jurors who have not been lawfully impaneled or sworn have no more authority to find indictments than the same number of citizens outside of the courthouse—they are not a grand jury in law."

The denial of the constitutional right to a jury which is a representative cross-section is an injury to the defendant. As said in *Allen v. The State*, 101 Ga. App. 56 (1964), p. 67,[7] "When an irregularity in criminal proceedings involving the constitutional rights of the defendant is shown, it is per se injurious to the defendant."[8]

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[6]Cf. Note, *Negro Defendants and Southern Lawyers; Review in Federal Habeas Corpus of Systematic Exclusion of Negroes from Juries*, 72 Yale L.J. 559 (1963), especially at 565 n. 25, 567-568 and n. 33, 569 n. 41.

[7]The issue in *Allen* was the same as is presented by petitioner here. Judge Hall in that well reasoned opinion found the prior holding of this Court to require that a white man be accorded the same right to complain as is accorded to a Negro. Had the Supreme Court of Georgia followed this opinion, petitioner would, of course, not be before this Court.

[8]*Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946); *Maryland v. Madison*, 213 A.2d 880 (1965) in which defendant who was not a member of the class unconstitutionally excluded was held to have standing to complain because grand jurors were required to show

The State of Georgia chose to provide the petitioner with a grand and petit jury. Having done so, Georgia had the duty to ". . . hew to the Federal constitutional criteria in insuring that the selection of membership is free of racial bias." *Carter v. Green County*, 396 U.S. 320, 330 (1970).

That black and white are entitled to equal treatment under the law is a fundamental proposition of our legal system. Black and white in legal theory have the same legal status. They live in the same communities, work at the same jobs, buy merchandise from the same stores, educate their children at the same schools, use the same public facilities and abide by the same local laws. In short, they comprise the community. The conclusion is therefore apparent —that if a jury is to contain a representative cross-section, it must contain both black and white. In *Carter v. Green County, supra*, p. 330, this Court, citing *Smith v. Texas, supra*, again reemphasized the meaning in a constitutional sense of a jury, to be

> "A body truly representative of the community, composed of peers or equals of the persons whose rights it is selected or summoned to determine; that is of his neighbors, fellows, associates, persons having the same *legal* status in society which he holds". (Emphasis supplied.)

If a jury, to be representative of the community, must have included those having the same *legal status*, then a white defendant in order to have a jury which is a body truly representative of the community must have included blacks. As stated in *Williams v. Florida*, 339 U.S. 78, p. 100 (1970),

> "The purpose of a jury trial, as we noted in *Duncan*, is to prevent oppression by the government. 'Providing an accused with the right to be tried by a jury of his

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their belief in the existence of God even though the defendant himself professed a belief in the existence of a Supreme Being. At p. 882, the Supreme Court of Maryland stated the basis for this decision: "Every person accused of crime has the right to be tried under what has been determined to be the law of the land."

> peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased or eccentrial judge.' *Duncan v. Louisiana*, 391 U.S. 145 at 156 (1968). Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accusor of the common sense judgment of a group of laymen in a community participation and shared responsibility that results from that group's determination of guilt or innocense."

All black and white citizens should be held to have an equal right of inclusion of the other upon the jury so that it may be a body truly representative of the community. If a negro has the right to have negroes included, then equal protection requires that a white have the right to have negroes included. Absent such a holding, our law would at most provide that whites are constitutionally entitled only to justice administered by whites and that blacks are constitutionally only entitled to justice administered by blacks. This in turn would logically lead to sanctioning all white juries for the trial of whites and all black juries for the trials of blacks. To sanction such logic as law would illustrate the danger of compromising the requirement of the representative cross-section pointed out in *Rabinowitz v. United States*, 366 F.2d 34, 45 (1966), citing *Smith v. Texas, supra*, at p. 45.

> "Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by representative groups are undermining processes, weakening the institution of jury trial and should be sturdily resisted. That the motives influencing such tendencies may be the best, must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties."

When the representative character of the jury is destroyed, there is prejudice regardless of the color or racial mixture

of the defendant. Trial experience in criminal cases teaches the uncertainty of the attitudes of jurors in relation to race.[9] A negro juror may have attitudes favoring a white defendant, if the white defendant has negro witnesses in his defense, or white witnesses against him. On the other hand, a negro juror may have attitudes favoring the white defendant in preference to the testimony of white law enforcement officers. The wisest of trial lawyers does little more than act on conjecture and speculation in striking a jury as to the effect of racial identity as it relates to a particular case. No one, however omniscient, knows the effect of the attitudes, prejudices, and personal experiences operating in the minds of the particular jurors.

In recognition of this fact, the Constitutional standard of selecting the jury, both Grand and Petit, from a representative cross section of the community was established. Such a standard to have validity must be color-blind.[10] Surely, it must mean that all defendants are entitled to have selected jurors possessing the representative attitudes, prejudices and thought patterns of the community. The essence of what is selected when a juror is selected, is his or her unique set of mental processes and attitudes with respect to the litigation to be analyzed.

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[9] "We can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof. It may be absent in one case and present in another; it may gradually and silently erode the jury system before it becomes evident. But it is no less real or meaningful for our purposes. If the constitutional right to a jury impartially drawn from a cross-section of the community has been violated, we should vindicate that right, even though the effect of the violation has not yet put in a tangible appearance. Otherwise that right may be irretrievably lost in a welter of evidentiary rules."

[10] As Justice Douglas said in dissent in *McDonald v. California*, ___ U.S. ___; 10 Cr.L. 4077 (Nov. 22, 1971), "We would all agree that the brand of justice received in our courts should not depend upon the color of one's skin and that the selection of jury panels should not be tainted by the exclusion of racial groups."

The color of the skin does not vote in the jury box—the mind of the juror does, as it may be affected by the multiple uncertainties of thought patterns, attitudes, prejudices and personal experiences which combine with the facts of the case and then mix with the attitudes of fellow jurors, producing the vote of the jury.

No one knows what effect the attitude of a black militant, a black civil rights worker, a black minister of the Baptist faith, a black school teacher, a black housewife or a black businessman or other members of the black community would have on the verdict of a jury when mixed with the attitudes of the other jurors and the facts of the particular case as they relate to a particular *white* defendant.[11]

Either all citizens have the right to have a jury drawn from a representative cross-section of the community free of racial bias or none have the right. The due process and equal protection of the law provisions of the Fourteenth Amendment should be declared to require State juries to be a body truly representative of the community available to all citizens without regard to the color of the skin.

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[11]What Justice Douglas said in *Ballard v. United States, supra*, in discussing the effect of the exclusion of women applies equally here in dealing with the white-black exclusion: "The subtle interplay of influence one on the other is among the imponderables . . . . Yet a flavor, a distinct quality is lost if either . . . is excluded." *Ballard v. United States, supra* at 193.

POINT II

THE RIGHT OF A WHITE PERSON TO CHALLENGE THE GRAND AND PETIT JURIES FROM WHICH NEGROES WERE SYSTEMATICALLY EXCLUDED IS NOT A NEW RULE OF LAW.

A defendant's right to a jury impartially drawn from a cross-section of the community has existed since the right of trial by jury was provided for in the United States Constitution.[12]

In *Whitus v. Georgia, supra,* this court did not "change" existing law or overrule any precedent, but was only a continued application of decades of authority. Indeed, as this Court so carefully pointed out in *Whitus, supra,* discrimination against Negroes, or any other class of persons, in the selection of state juries, has been held violative of the Fourteenth Amendment since 1879, in *Strauder v. West Virginia,* 100 U.S. 303, 25 L.Ed. 664; and the principle has been several times reiterated, *Norris v. Alabama,* 294 U.S. 587, 55 S. Ct. 579, 79 L.Ed. 1074 (1935); *Pierre v. Louisiana,* 306 U.S. 354, 59 S. Ct. 536 (1939). Further, the Court found that the circumstances struck down in *Whitus* were "akin" to those condemned in *Avery v. Georgia,* 345 U.S. 559, 73 S.Ct. 891 (1953). Subsequently, in *Williams v. Georgia,* 349 U.S. 375, 75 S.Ct. 814 (1955), this Court made clear that what it was condemning in *Avery* was the "system of selection" and not any particular method by which it was carried out.

Thus considered, it is plain that *Whitus* made no change in law enforcement procedures or established any "new" line of authority, but was merely a case of applying time-honored and established principles to discriminatory techniques which had become slightly more covert. The Court's opinion in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731

[12] *Smith v. Texas, supra,* p. 130.
Williams v. Florida, 399 U.S. 78, 93, n. 35 (1970).

(1965) in fact, show, by its distinguishing of other cases, that no concept of "retroactivity" is involved in circumstances such as those in the case at bar:

> "It is urged, however, that these same considerations apply in the cases that we have applied retrospectively in other areas, notably that of coerced confessions, and that the Mapp exclusionary rule should, therefore, be given the same dignity and effect. Two cases are cited, *Faye v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), and *Reck v. Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed. 2d 948 (1961), but neither is apposite. It is said that we ordered new trials 25 years after conviction in the latter and after the lapse of 21 years in the former. This time table is true but that is all. The principle that a coerced confession is not admissible in a trial predated the arrests as well as the original convictions in each of these cases. See *Brown v. State of Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936). *There was no question of retrospective operation involved in either case.*" (Emphasis supplied)

At least eleven years before *Whitus*, the states in general and Georgia in particular, had been told that any trick, device, or arrangement of colored papers which had the effect of deliberate exclusion of a segment of the population from criminal juries was constitutionally intolerable, *Avery v. Georgia*, *supra*, and *Williams v. Georgia*, *supra*. To hold the *Whitus* decision inapplicable to the case at bar because of a concept of "retroactivity" would not only distort the useful principles of retrospective vs. prospective application, but would also encourage any state officials, who were so inclined, to engage in an interminable hare-and-hounds contest with the federal courts.

It is obvious that the subtleties which may be employed to bring about the *result* of purposeful exclusion are as infinite as human imagination. If the reasoning urged by the State of Georgia in these two cases were to be approved by the courts, the important principle in *Whitus v. Georgia, supra,* would be whittled away to an intolerably narrow factual base, and a premium would be placed upon the ingenuity of the various evasions which might be devised by state officials inclined to perpetuate the old abuses.

We submit that this danger alone removes the question of prospective vs. retrospective, notwithstanding the state authorities' assurance that the method of jury selection has been changed. It was changed after *Avery* in 1952, but the old abuses continued. Viability can be given to the *Whitus* principle only by striking down convictions which resulted from discredited practices.

The system about which *Whitus* was complaining in his original habeas corpus was the same system about which the petitioner is now complaining. Completely apart from *Whitus, Avery* and *Williams,* would have been an adequate reason for granting of the writ and correction of the abuse. This is proved by the fact that the Fifth Circuit's grant of habeas corpus on account of jury discrimination in *Vanleedward v. Rutledge,* 369 F.2d 584 (CA 5, 1966) occurred *prior* to *Whitus.*

It is most likely that it was these precedents that this Court had in mind at the time of its per curiam reversal in *Whitus v. Balkcom,* 370 U.S. 728, 82 S. Ct. 1675, 8 L.Ed. 2d 803. See also, *Whippler v. Dutton,* 391 F.2d 425 (CA 5, 1968), wherein the Fifth Circuit apparently assumed the non-existence of any retroactivity question.

Arguments opposed to this view would contend that both *Whitus* and the result which petitioner is now seeking, would constitute a "new" rule of law in the same sense as cases such as *Mapp v. Ohio,* 362 U.S. 643 (1960, which expressly overruled *Wolf v. Colorado,* 338 U.S. 25 (1945), or *Katz v. United States,* 389 U.S. 347, which expressly overruled long standing

lines of authority holding that law enforcement officials were free to eavesdrop without physical tresspassing.

The rule of law which petitioner is urging here was logically established, at least as early as 1946, as stated in *Ballard v. United States, supra,*[13] "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." *Faye v. New York, supra,* is not in conflict with this principal for in *Faye* the court, at p. 287, said, "Nevertheless, we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well established case under the Amendment."

Indeed, the exact rule which the petitioner urges was squarely stated by the Fifth Circuit in *Rabinowitz v. United States, supra,* where, in referring to the standing of a white person in Federal Court to challenge the exclusion of Negroes from juries, that Court said:

> "Indeed, a departure from the statutory scheme, which 'deprives the jury system of the broad base it was designed by Congress to have in our democratic society' may be asserted by any litigant, even though he is not a member of the excluded class." 366 F.2d 34, 37.

Not only was the right of a white person recognized to exist in the Fifth Circuit at the time of petitioner's trial but Georgia Court of Appeals in *Allen v. State, supra,* had held that such a right in fact existed in Georgia.[14] However, the Supreme Court of Georgia refused to follow the *Allen* case.

[13] *Ballard v. United States, supra,* p. 195 (1946).

[14] *Allen v. State, supra,* citing *Faye v. New York, supra,* and *Beck v. Washington,* 369 U.S. 541, in which the Court of Appeals of Georgia said,

> "We are of the opinion that any system that results in the consistent selection of jurors from a group or portion only of those available for service in that office rather than from those available without discrimination, does not accord to any defendant the type of jury to which the law entitles him.

POINT III

LOGIC AND PUBLIC POLICY REQUIRE RETROSPECTIVE APPLICATION OF THE RIGHT OF A WHITE PERSON TO COMPLAIN OF SYSTEMATIC EXCLUSION OF NEGROES

Retrospective application of the right of a white person to complain is warranted by the standards found in prior decisions of this court.

In *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 19 L. Ed. 2d 1199 (1967), this court held the new rules as to "line-up" identification were not to be applicable to earlier cases. In so deciding, the Court set forth the guidelines to be applied in determining the manner of application of a new rule:

> "* * * 'These cases establish the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective * * * where the exigencies of the situation require such an application" * * *.' *Johnson, supra*, 384 U.S., at 726-727, 86 S.Ct., at 1777. The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) *the extent of the reliance by law enforcement authorities on the old standards*, and (c) the effect on the administration of justice of a retroactive application of the new standards. '[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provisions of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background or precedent, and its own impact on the administration of justice, and the way in which these factors combine must

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'The equal protection clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community.'"

inevitably vary with the dictate involved.'" 87 S.Ct. at 1969-1970. (Emphasis supplied).

Petitioner denies that *Whitus* presented any "new" rule within the meaning of this language. Even, however, if it be considered a new standard, petitioner urges that the application of the Court's criteria above cited would require that the general principle of retrospective interpretation be followed.

With respect to criterion (a), the purpose of the *Whitus* rule is to correct what the Court characterized as "the evil" (385 U.S. 545, 552) resulting from a "system of selection" which arbitrarily discriminated against a race or class of people. It seems to petitioner, therefore, that the purpose of *Whitus* (and the cases following it) was to place once and for all the Supreme Court's stamp of disapproval upon any method of jury selection which *resulted* in the exclusion of any eligible segment of the population from juries, or produced juries which were less than a fair cross-section of the community.

If *Whitus* is narrowed to a prospective application to the particular method there invovled, the purpose might well be thwarted. The prosecuting authorities might well devise new methods which would accomplish the old result, secure in the knowledge that prosecutions gained by such methods would be undisturbed.

Criterion (b)—the extent of reliance by the authorities on the old standards—requires no elaborate argument. Petitioner knows of no decision by the Supreme Court, or any other court, which—at least for the last fifteen years—could have lead the Georgia authorities to believe that they were justified in discriminating against Negroes, or any other segment of the population, in the selection of any grand or petit jury, no matter who was being tried. Indeed, every indication that the Supreme Court gave, and especially *Avery* and *Williams*, should have compelled the opposite conclusion. No constitutional authority *ever* told the officials of Georgia that they could purposefully exclude Negroes or include them only in token numbers.

This concept is sharply to be distinguished from the *Mapp v. Ohio, supra,* and *Wolf v. Colorado, supra,* situation; prosecuting authorities would certainly have been entitled to rely on *Wolf.* Also, *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), struck down the statutory privilege of commenting on the failure of the accused to testify—which had not theretofore been challenged. The same is true as to *Katz v. United States, supra,* which overruled *Olmstead v. United States,* 227 U.S. 438.

It is certainly reasonable to assume that law enforcement authorities would have, for decades, relied on *Olmstead,* and in this light, the *holding* of *Desist* would be logically expected.

Escobedo and *Miranda,*[15] impliedly overruled *Crooker v. California,* 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed. 2d 1448 (1958), upon which law enforcement officials were justifiably entitled to reply.

Finally, there is criterion (c)—the "effect on the administration of justice". We do not think that this standard refers to the expressed fears of a mass legalized jailbreak. We think that the Supreme Court had in mind the right of prosecuting authorities to rely upon apparently valid procedures considered in connection with any inherent unreliability in the discredited procedure.

Eavesdropping evidence, and line-up evidence, for example, have no "inherent unreliability", but depend upon other constitutional or policy considerations. A biased grand jury, or petit jury, however (biased because of an unlawful exclusion of a portion of the population) is inherently unreliable and has long been so recognized.

The correctness of retrospective application is shown by the Fifth Circuit's opinion in *United States v. Lucia,* 416 F.2d 920 (CA 5, 1969) (affirmed after reconsideration *en banc,* 423 F.2d 697 (CA 5, 1970), in which the Court said:

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[15] *Miranda v. Arizona,* 384 U.S. 436.
Escobedo v. Illinois, 378 U.S. 478.

> "In contrast, new constitutional rules going to the fundamental fairness of a trial, the accuracy and reliability of the fact-finding process, rules that substantially reduce the likelihood that an innocent person will be convicted, have received retroactive application. For example, in *Bruton v. United States* 1968, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 overturning *Delli Paoli v. United States*, 1957, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed. 2d 278, the Court held that the admission of a defendant's extra-judicial confession implicating a co-defendant violates the co-defendant's right to confront his accuser under the Sixth Amendment. In *Roberts v. Russell*, 1968, 392 U.S. 293, 295, 88 S. Ct. 1921, 1922, 20 L. Ed. 2d 1100, 1103, the Court held that '[this] constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined.' The purpose of the new *Bruton* rule, greater accuracy in guilt-determination, applied to past as well as future trials, and the Court therefore extended *Bruton* retroactively."— 416 F.2d 920, at 925.

Also there would be an anomalous "effect on the administration of justice" of a rule which would free black people, but leave whites in prison. This approach would still allow extensive habeas corpus litigation, while setting a constitutionally impermissible reverse double standard for white and black prisoners.

Whether or not petitioner was subject to actual provable prejudice in his indictment and trial, rather than the prejudice which is presumed cannot be determined because of the absence of an evidentiary hearing, however, we do not think this Court can logically make any "prospective only" standard, where at least some white people are the victims of actual, as opposed to presumed, prejudice.

Therefore, if the decisions need be made this Court should decide on a generalized application of the rule as in the cases of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed. 2d 799; *McNerlin v. Denno*, 378 U.S. 575, 84 S.Ct. 1933, 12 L. Ed. 2d 1041 (1964); *Eskridge v. Washington*

State Prison Board, 357 U.S. 214, 78 S.Ct. 1061, 2 L. Ed. 2d 1269 (1958) and *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed. 2d 476 (1968).

CONCLUSION

Petitioner, a white man, has alleged the denial of due process and equal protection by systematic exclusion of negroes from his trial and grand juries. Such allegations should be held by this Court to constitute a claim which, if proven, would entitle petitioner to relief. The right of a white person to complain of systematic racial exclusion of blacks should be held to be retrospective in application. This Court should reverse the holding of the Court below.

Respectfully submitted,

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